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No. 02-1183

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a failure to give a suspect the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 304 F.3d 1013.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2002. A petition for rehearing was denied on December 9, 2002 (Pet. App. 34a). The petition for a writ of certiorari was filed on February 12, 2003, and was granted on April 21, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part that "[n]o person shall

* * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

STATEMENT

On June 19, 2001, a grand jury sitting in the United States District Court for the District of Colorado indicted respondent for possession of a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court granted respondent's motion to suppress the firearm. The court of appeals affirmed. Pet. App. 1a-33a.

1. On June 6, 2001, Officer Tracy Fox of the Colorado Springs Police Department arrested respondent outside his residence for violating a domestic violence restraining order. Shortly thereafter, Detective Josh Benner, who was part of a gun interdiction task force of the Bureau of Alcohol, Tobacco, and Firearms and who had been told by a probation officer that respondent was a convicted felon and possessed a Glock .40 pistol, began reading respondent his *Miranda* rights. After he was advised of his right to remain silent, respondent told the detective that he knew his rights. At that point, Detective Benner stopped reading the *Miranda* warnings. Pet. App. 2a-4a; see J.A. 32, 41, 47-48.

Detective Benner asked respondent what guns he owned, and respondent replied that a .357 was already in police custody. Benner asked respondent about the Glock pistol, and respondent said that the pistol was on a wooden shelf in his bedroom. Respondent gave Benner permission to retrieve the pistol, and Benner went into the residence, found the pistol on the shelf, and seized it. Pet. App. 4a.

2. The district court granted respondent's motion to suppress the firearm, ruling that the police officers lacked probable cause to arrest respondent for violating the domestic violence restraining order. J.A. 78-88. The court did not rule on respondent's alternative argument that the firearm should be suppressed as the fruit of an unwarned statement by respondent. J.A. 86. The government appealed.

3. The court of appeals affirmed. Pet. App. 1a-33a. The court reversed the district court's ruling that respondent's arrest was not supported by probable cause. *Id.* at 5a-10a. The court nevertheless affirmed the district court's suppression order on the alternative ground that the firearm was inadmissible as the fruit of a statement obtained without *Miranda* warnings. *Id.* at 10a-33a.

The court acknowledged that this Court in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), had "declined to apply the fruits of the poisonous tree doctrine of *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963), to suppress evidence obtained from an un-Mirandized confession." Pet. App. 11a-12a. The court also acknowledged that in *United States* v. *McCurdy*, 40 F.3d 1111 (10th Cir. 1994), it had previously read *Elstad* and *Tucker* to prohibit the suppression of physical evidence obtained as a result of an unwarned statement except when the statement was not voluntary. Pet. App. 19a. The court concluded, however, that this Court's holding in *Dickerson* v. *United States*, 530 U.S. 428 (2000), that *Miranda* is a constitutional rule "undermined the logic underlying *Tucker* and *Elstad*." Pet. App. 13a. On that ground, the court held that it was not bound by its prior decision in *McCurdy*. *Id.* at 19a-20a.

Examining the issue anew, the court concluded that neither *Elstad* nor *Tucker* supported the proposition that *Miranda* permits the introduction of derivative physical evidence when the defendant's unwarned statement was voluntary. Pet. App. 15a-21a. The court emphasized that *Tucker* involved an interrogation that occurred before *Miranda* was decided, and the court read *Tucker* as resting "largely on [the] conclusion that excluding the fruits of [the unwarned] confession would have minimal prophylactic effect because the officers were acting in complete good faith under prevailing pre-*Miranda* law." *Id.* at 13a. The court distinguished *Elstad* on the ground that the evidence derived from the unwarned statement in *Elstad*—subsequent voluntary statements made by the defendant after the administration of *Miranda* warnings—was a product of the defendant's volition. *Id.* at 16a-18a.

The court acknowledged that "[c]ourts applying *Dickerson* have split on the proper application of *Wong Sun* to the physical fruits of a *Miranda* violation." Pet. App. 20a. Rejecting the approaches of the Third Circuit in *United States* v. *DeSumma*, 272 F.3d 176 (2001), cert. denied, 535 U.S. 1028 (2002), and the Fourth Circuit in *United States* v. *Sterling*, 283 F.3d 216, cert. denied, 535 U.S. 931 (2002), the court decided that a deterrence rationale required the suppression of physical evidence derived from statements made by a suspect who had not been given *Miranda* warnings. Pet. App. 21a-28a. Rejecting the approach of the First Circuit in *United States* v. *Faulkingham*, 295 F.3d 85 (2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002), the court also decided that the suppression of derivative physical evidence was required even when a police officer's failure to give *Miranda* warnings was negligent rather than intentional. Pet. App. 28a-33a. The court thus held that physical evidence derived from a suspect's unwarned statement must always be suppressed, regardless of its voluntariness, because *Miranda* is a constitutional rule.

SUMMARY OF ARGUMENT

Miranda does not require the suppression of physical evidence derived from a voluntary statement taken without *Miranda* warnings. Neither the rationale of *Miranda*, nor this Court's recognition that it is a constitutional rule, supports such an extension of the *Miranda* rule. To the contrary, any such extension would depart from the rule's purpose and would impose unnecessary costs on the truthseeking function of criminal trials.

I. The core right in the Self-Incrimination Clause is the privilege of a criminal defendant not to be compelled to testify against himself at a criminal trial. To effectuate that rule, the privilege may be asserted not only at the criminal trial, but also in pretrial or other proceedings. An analogous principle protects the defendant against having compelled incriminating statements made to the police during an investigation used against him at trial. In all of those contexts, the Self-Incrimination Clause, as its text implies, protects individuals only from being *compelled* to speak; the Clause is not concerned with voluntary, though incriminating, statements.

The *Miranda* rule was developed to protect the core Fifth Amendment right. *Miranda* was a response to this Court's decades-long experience with case-by-case adjudication under the Due Process Clause of whether, on the facts of particular cases, the defendants had in fact been compelled to speak during custodial interrogation. This Court concluded in *Miranda* that the

due process test had resulted in an unacceptably high risk that involuntary confessions will not be detected and will be admitted against the defendant. To reduce that risk, *Miranda* excludes unwarned statements in the prosecution's case in chief.

A failure to administer *Miranda* warnings, however, does not establish that actual compulsion has been applied to a defendant. Voluntary statements taken without full compliance with the *Miranda* procedures may be used for impeachment of a testifying defendant or where the failure to give warnings was justified by public safety considerations. Similarly, the Court has not required the suppression of derivative *testimonial* evidence solely because a statement was taken without warnings. See, *e.g.*, *Oregon* v. *Elstad*, 470 U.S. 298 (1985). Rather than apply a Fourth Amendment fruit-of-the-poisonous-tree analysis, *Elstad* recognized that Fifth Amendment *Miranda* analysis does not require or justify suppression of derivative evidence when the unwarned statement was not, in fact, coerced.

II. Under those principles, physical evidence discovered as a result of a voluntary unwarned statement should not be excluded from the government's case.

First, once unwarned statements are excluded from the prosecution's case in chief, the defendant has received safeguards against the risk that the Fifth Amendment will be violated by introduction of his compelled statements. The defendant's core Fifth Amendment right is therefore protected. There is no justification for further applications of the *Miranda* prophylaxis, which conclusively presumes compulsion based on the omission of warnings.

Second, extension of the *Miranda* rule to physical evidence uncovered following the taking of a voluntary

unwarned statement would impose an unacceptably high cost on the truthseeking function of the criminal trial. In this case, for example, exclusion of the gun would impose an insuperable barrier to prosecution. Providing respondent with effective immunity from prosecution is not necessary to provide protection for his core Fifth Amendment right.

Third, there is no sufficient policy reason to justify the imposition of those high costs. The Self-Incrimination Clause is concerned with compulsion to provide testimony. It is not directly concerned with physical evidence. In the context of compelled immunized testimony, the Court has required the exclusion of evidence indirectly derived from the compelled statements. *Kastigar* v. *United States*, 406 U.S. 441 (1972). But in the *Miranda* context, the fact that police officers acquired a statement without the issuance of the warnings does not show that actual compulsion was applied.

A deterrence rationale also provides no support for extending the *Miranda* rule to physical evidence. The Constitution does not forbid the police from taking unwarned statements. Rather, the Fifth Amendment confers a trial right, and *Miranda* protects against violation of that right by excluding unwarned statements. In that respect, *Miranda* differs from the Fourth Amendment, where the exclusionary rule (including its "fruits" component, *Wong Sun* v. *United States*, 371 U.S. 471 (1963)) cannot prevent a violation and seeks to achieve wholly prospective results. And even if it were thought advisable to provide an incentive for police officers to give *Miranda* warnings, ample incentive already exists as a result of the rule requiring suppression of the unwarned statement itself.

Finally, exclusion of unwarned statements, which might have been coerced, can be said to protect the fairness of the trial by excluding a possibly unreliable confession. But such reliability concerns have no force with respect to unquestionably reliable physical evidence discovered as a result of an unwarned statements.

III. The court of appeals found support for extending *Miranda* to physical evidence based on this Court's decision in *Dickerson* v. *United States* 530 U.S. 428 (2000), which recognized that *Miranda* is a constitutional rule. Nothing in the recognition that *Miranda* is a constitutional rule, however, suggests that the scope of that rule should be broadened. To the contrary, the Court's decision in *Dickerson* was itself based on principles of stare decisis, and the *Dickerson* opinion relied on existing limits to the *Miranda* rule as a basis for declining to overrule its precedent.

Nor does *Dickerson* undermine the analytical foundations of cases such as *Oregon* v. *Elstad*, *supra*. *Dickerson*'s recognition that the *Miranda* rule is constitutional in origin does not mean that a failure to give warnings is equivalent to actual coercion. Instead, *Miranda*—both before and after *Dickerson*—is a prophylactic constitutional rule, *i.e.*, a safeguard to protect the core constitutional right of a defendant not to be a witness against himself. *Dickerson*'s analysis therefore provides no basis for a novel extension of the *Miranda* rule to require automatic exclusion of physical evidence derived from unwarned statements.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT REQUIRE THE EXCLUSION OF NONTESTIMONIAL PHYSICAL EVIDENCE DERIVED FROM A SUSPECT'S UNWARNED, VOLUNTARY STATEMENT

After the police arrested respondent, one officer began to inform him of his *Miranda* rights in order to ask him questions about the location of a gun. The officer told respondent that he had the right to remain silent. Before the officer could complete the rest of the warnings, respondent interrupted and said he knew his rights. J.A. 46-47. In response to the officer's questions, respondent then informed the officer that a Glock pistol was in his bedroom, and he gave the officer consent to retrieve it. J.A. 42. The officer did so. J.A. 42. Even though there is every reason to conclude that respondent's statements were "voluntary" in traditional due process analysis, there is no dispute that, as a result of the officer's failure to complete the *Miranda* warnings, respondent's statements are inadmissible in the government's case in chief. The question is whether the giving of incomplete *Miranda* warnings, by itself, constitutes a constitutional violation that requires the suppression of the Glock pistol under the fruit-of-the-poisonous-tree doctrine announced in *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The court of appeals' holding that suppression of the gun is mandated fundamentally misconceives the role of *Miranda* in protecting the Fifth Amendment privilege against compelled self-incrimination.

Miranda is "a constitutional decision of this Court," *Dickerson* v. *United States*, 530 U.S. 428, 432 (2000), but the nature of the constitutional rule in *Miranda* is crucial in assessing its implications. The taking of a

statement without the warnings set forth in *Miranda* does not, by itself, constitute compulsion within the meaning of the Fifth Amendment. Instead, *Miranda* sets up an evidentiary rule designed to prevent the *risk* that an actually compelled statement may be admitted into the government's case in chief. *Miranda* thus creates a limited exclusionary rule for unwarned statements themselves. The admission of physical evidence derived from voluntary unwarned statements, however, does not present the risk that an actually compelled statement will be admitted. Accordingly, such physical evidence is not subject to exclusion based solely on the failure to give the warnings. To suppress such physical evidence would be to extend the *Miranda* rule far beyond its purpose, at a high cost to the truth-seeking function of a criminal trial, and with no sufficient offsetting benefits.

Dickerson itself made clear that the particularized rules adopted by this Court to refine the meaning of *Miranda* are equally part of the constitutional doctrine in this area. 530 U.S. at 441. The Court specifically noted that it had refused "to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases" to situations involving voluntary unwarned statements under *Miranda*. *Ibid.* (citing *Oregon* v. *Elstad*, 470 U.S. 298 (1985)). Just as the Court has refused to apply the fruit-of-the-poisonous-tree doctrine of *Wong Sun* to suppress testimonial evidence obtained from unwarned statements, *Elstad*; *Michigan* v. *Tucker*, 417 U.S. 433 (1974), it should hold here that physical evidence obtained as a result of a voluntary, but unwarned statement is not subject to suppression under *Miranda*. The complete and sufficient response to the failure to give *Miranda* warnings is to exclude

the ensuing statement from the government's case in chief.

I. *MIRANDA* IS AN EXCLUSIONARY RULE THAT PROTECTS A DEFENDANT'S FIFTH AMENDMENT PRIVILEGE NOT TO HAVE COMPELLED STATEMENTS INTRODUCED AGAINST HIM AT TRIAL

The starting point for analysis of whether the failure to give *Miranda* warnings requires suppression of physical evidence derived from the suspect's unwarned statements is a description of the Fifth Amendment rights that *Miranda* protects, as well as the way in which it protects them. That description makes clear that a failure to give *Miranda* warnings, by itself, cannot be regarded as a violation of the Self-Incrimination Clause's provision that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." Instead, *Miranda* establishes a constitutionally based judicial device to protect against the risk that a compelled statement would be mistakenly admitted in a criminal case.

A. The Core Of The Fifth Amendment's Protection Is The Exclusion Of A Defendant's Compelled Incriminating Statements At A Criminal Trial

The core protection afforded by the Fifth Amendment is that a criminal defendant cannot be compelled to testify against himself at a criminal trial. See *Chavez* v. *Martinez*, 123 S. Ct. 1994, 2000-2001 (2003) (plurality opinion); *id.* at 2006 (Souter, J., concurring) ("[t]he text of the Fifth Amendment * * * focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence"). No penalty may be imposed on a defendant for refusing to testify at a criminal trial. *Griffin* v.

California, 380 U.S. 609, 614 (1965) (prohibiting comments by court or prosecutor on a defendant's refusal to testify). The privilege permits a defendant at a criminal trial to decline even to be sworn as a witness. *Wilson* v. *United States*, 149 U.S. 60, 66 (1893); see *Griffin*, 380 U.S. at 613 (noting that *Wilson*, though based on a statute, states the constitutional rule). At the defendant's request, a judge must instruct the jury not to draw an adverse inference from a defendant's failure to testify. *Carter* v. *Kentucky*, 450 U.S. 288 (1981).

1. To effectuate the core Fifth Amendment privilege, the Court adopted a related rule allowing the privilege to be asserted in proceedings outside a criminal trial. "It has long been held that [the prohibition of the Self-Incrimination Clause] not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973)); see *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974) ("Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited."). Accordingly, if a person can "demonstrate that any testimony he might give * * * could be used in a criminal proceeding against him brought by the * * * United States or one of the States, he would be entitled to invoke the privilege." *United States* v. *Balsys*, 524 U.S. 666, 671-672 (1998).

That right is closely connected to the core protection of the Self-Incrimination Clause. Both at trial and in a pretrial proceeding, the subject of the inquiry, having been placed under oath, is subject to "the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). The "natural concern" of providing protection to a potential defendant "is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." *Michigan* v. *Tucker*, 417 U.S. at 440-441.

2. Trials, not police interrogations, are at the core of the Fifth Amendment privilege. Nonetheless, the privilege has also been extended to protect a person from having compelled incriminating statements made to the police in an investigation used against him at trial. *Miranda* v. *Arizona*, 384 U.S. 436, 461, 478 (1966); see also *Wan* v. *United States*, 266 U.S. 1, 14 (1924); *Bram* v. *United States*, 168 U.S. 532, 542 (1897). The justification is similar to the justification for extending the privilege to formal proceedings outside of a criminal trial. If a person can be compelled through police pressure (rather than the formal sanction of contempt) to answer police questions during an investigation, his opportunity to assert the privilege at trial and refuse to testify will be compromised. The extension of the privilege to police questioning provides doctrinally distinct, but parallel protection for the defendant to that provided by the longstanding due process rule precluding admission into evidence of involuntary statements made during police interrogation. See *Dickerson*, 530 U.S. at 433-435; *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

3. In all of these contexts, the explicit textual mandate of the Fifth Amendment requires that, for the

Clause to apply, the defendant must be "compelled" to speak. "Volunteered statements of any kind are not barred by the Fifth Amendment," *Miranda*, 384 U.S. at 478, nor are statements that are not the product of pressures emanating from official coercion, *Colorado* v. *Connelly*, 479 U.S. 157, 170 (1986) ("The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion."). See also *Michigan* v. *Tucker*, 417 U.S. 433, 448 (1974) ("Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* * * *."). The literal language of the Self-Incrimination Clause does not establish *how* coercion is to be proved, or whether, and under what circumstances, it may be presumed. Courts may craft "complementary" rules of adjudication that facilitate protection of the privilege when "the judicial capacity to protect" the core Fifth Amendment guarantee would be seriously jeopardized without them. *Chavez*, 123 S. Ct. at 2007 (Souter, J., concurring). But the Fifth Amendment is not implicated in the absence of coercion or its substantial risk.

B. *Miranda* Created A Rule Of Exclusion To Protect The Defendant's Core Fifth Amendment Right Not To Have His Compelled Statements Used Against Him At Trial

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court provided additional protection for the Fifth Amendment in the context of custodial interrogation, beyond the traditional due process test that required proof that, in the totality of the circumstances, any confession had to be voluntary to be admissible against the defendant. *Miranda* held that statements made by a defendant in response to custodial interrogation are

not generally admissible against him in the government's case in chief unless the defendant voluntarily and knowingly agreed to speak after being administered what have become known as *Miranda* warnings. Those warnings are that a defendant "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479; *Dickerson*, 530 U.S. at 435.

The *Miranda* rule was adopted to provide "adequate safeguards" for Fifth Amendment rights. 384 U.S. at 457; see also *id.* at 491 (Court's opinion announced "constitutional standards for *protection* of the privilege") (emphasis added). In numerous cases in the thirty years before *Miranda*, the Court had used the "totality of the circumstances" test to determine whether a confession made in the course of custodial interrogation was voluntary under the Due Process Clause and therefore admissible in evidence. See *Dickerson*, 530 U.S. at 434-435. But because "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," *id.* at 435, the *Miranda* Court found that "reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt."[1] *Id.*

[1] The risk exists for several reasons. First, the legal standards for determining involuntariness require a fact-specific assessment in each case of all of the circumstances of the interrogation as applied to a particular subject—an inquiry for which precedent may not afford adequate guidance. *Dickerson*, 530 U.S. at 444. Second, courts may experience an "inevitable and understandable

at 442 (citation omitted). The Court concluded in *Miranda* that the Fifth Amendment right should be protected by requiring, before a confession could be offered in the government's case in chief, that the government demonstrate that it was preceded by the *Miranda* warnings.[2]

Miranda's rule does not result in a complete, substitute definition for the compulsion required to trigger the Fifth Amendment. Even if the defendant receives *Miranda* warnings and speaks, he may still assert that his statements were involuntary and thus inadmissible. *Dickerson*, 530 U.S. at 444. Nonetheless, the *Miranda* rule does "simplify subsequent inquiry into voluntariness," *Chavez*, 123 S. Ct. at 2007 (Souter, J., concurring), and it is therefore likely to be effective in the vast run of cases to ensure that involuntary statements are not admitted in the government's case in chief. See *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.").[3]

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reluctance to exclude an otherwise reliable admission of guilt," *Miller* v. *Fenton*, 474 U.S. 104, 117 (1985), and thus may err on the side of admission of statements even when they should be excluded.

[2] *Miranda* left open the possibility that legislatures might be able to devise solutions that did not involve the warnings if those solutions were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." 384 U.S. at 467; see *Dickerson*, 530 U.S. at 440-442. That option is not implicated in this case.

[3] See also *Oregon* v. *Elstad*, 470 U.S. at 318 ("The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative [on the voluntariness of his statements]."); *Colorado* v. *Spring*, 479 U.S. 564, 576 (1987) ("Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled.") (citation omitted).

At the same time, because *Miranda* simplifies litigation and protects the Fifth Amendment privilege by casting a wider net than the definition of compulsion might require if applied case-by-case, it cannot be seen as playing the same role in criminal cases as an actual determination of compulsion. See *Chavez*, 123 S. Ct. at 2004 (plurality opinion) ("We have * * * established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause."); *id.* at 2007 (Souter, J., concurring in the judgment) (*Miranda* rule is "outside the Fifth Amendment's core, * * * expressing a judgment that the core guarantee, or the judicial capacity to protect it, would be placed at some risk in the absence of such complementary protection."). An actual determination of compulsion precludes *any* use of the compelled statement in the criminal case. See p. 19, *infra*. *Miranda* instead creates a limited rule of exclusion that is designed to protect the core Fifth Amendment right at trial—the admission of the accused's own compelled statements—and its rationale therefore does not extend to precluding all uses of the unwarned statement.[4]

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[4] Because *Miranda* does not define a substantive rule of conduct for the police, but instead provides a "rule of exclusion," *Chavez* v. *Martinez*, 123 S. Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part), for the court to use in protecting "a fundamental *trial* right," *Withrow* v. *Williams*, 507 U.S. 680, 691 (1993) (citation omitted), *Miranda* does not create a rule that the government must refrain from questioning custodial suspects

C. Because *Miranda* Sweeps More Broadly Than The Core Fifth Amendment Privilege, A Failure To Give Warnings Does Not Preclude All Uses Of Ensuing Statements

Based on its purpose to protect against the risk of admitting a coerced statement at trial, *Miranda* ordinarily prohibits admission of unwarned statements in the government's case in chief. But the Court has determined that *Miranda* does not reach farther to mandate exclusion of *all* testimonial or incriminating use of a voluntary unwarned statement.

1. This Court recognized early on that "[i]t does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes." *Harris* v. *New York*, 401 U.S. 222, 224 (1971). The Court held in *Harris* that unwarned confessions obtained in custodial interrogation were admissible to impeach a defendant's testimony. Accord *Oregon* v. *Hass*, 420 U.S. 714 (1975) (questioning after suspect requested an attorney could be used for impeachment).[5] The absence of warnings, the Court held, did not taint the statement's use for impeachment "provided that 'the trustworthiness of the evidence satisfies legal standards.'" *Id.* at 722 (quoting *Harris*, 401 U.S. at 224); see *Harris*, *id.* at 224 (no claim was made that Harris's statements were "coerced or involuntary"); *Hass*, 420 U.S. at 722-723 (no claim made that Hass's statements were "involuntary or coerced"). In *New York* v. *Quarles*, 467 U.S. 649 (1984), the Court made an exception to *Miranda*'s general bar on the use of unwarned statements in the government's case in chief. *Quarles* held that voluntary unwarned statements made by a defendant during custodial interrogation, but obtained in order to protect the public safety, were admissible in trial against the defendant.

Neither the impeachment rule nor the public safety rule can be reconciled with the position that *Miranda* means that unwarned statements made in custodial interrogation are inherently "compelled" under the Fifth Amendment. In *New Jersey* v. *Portash*, 440 U.S. 450 (1979), the Court held that when testimony is compelled under a grant of immunity, it cannot be used to impeach the defendant's trial testimony. "[A] defendant's compelled statements," the Court explained, "as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial." *Id.* at 459; see also *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) (impeachment with involuntary statements barred). Thus, statements that are the product of government compulsion are inadmissible for all purposes in a criminal trial. But, as *Harris* and *Quarles* establish, voluntary statements taken without compliance with the *Miranda* procedures during custodial interrogation *are* in some circumstances admissible against the defendant. Accordingly, *Harris* and *Quarles* establish that statements taken without *Miranda* warnings are not necessarily compelled.

2. This Court's decisions in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), reflect the principle that *Miranda* establishes a

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without giving warnings. Police officers do not violate a constitutional prohibition if they conduct non-coercive custodial interrogation without administering *Miranda* warnings. All that ensues is that the statements that result generally cannot be used against the defendant in the government's case in chief.

[5] In both *Harris* and *Hass*, the trial judge instructed the jury that the unwarned statement could be considered as proof only of the defendant's credibility as a witness, not as proof of the defendant's guilt. *Harris*, 401 U.S. at 223; *Hass*, 420 U.S. at 717.

rule of limited admissibility of unwarned statements in the government's case in chief—not a rule that unwarned statements amount to a constitutional violation that necessarily entails the suppression of "fruits." In both *Tucker* and *Elstad*, the Court declined to apply the fruit-of-the-poisonous-tree doctrine to suppress testimonial evidence uncovered following an unwarned statement. In *Tucker*, the Court held that the testimony of a witness who was discovered as a result of a statement obtained from a defendant who had not been given complete *Miranda* warnings did not have to be suppressed as the fruit of the unwarned statement. 417 U.S. at 446-452. In *Elstad*, the Court held that the defendant's own *Miranda*-warned statement obtained after the defendant had previously given a statement without *Miranda* warnings did not have to be suppressed as the fruit of the initial unwarned statement.[6] 470 U.S. at 304-305, 317-318.

Tucker and *Elstad* are premised on the recognition that *Miranda* did not create an absolute rule that unwarned statements are necessarily compelled and that custodial interrogation must therefore be preceded by the warnings if any use of the statement is to be made. See *Tucker*, 417 U.S. at 443-445 (unwarned statements at issue were neither compelled nor "involuntary as that term has been defined in the decisions of this Court"). Indeed, in *Elstad*, the Court explained

[6] The defendant in *Elstad* also argued that, in determining the voluntariness of the second (warned) statement, courts should use the same analysis conducted when the prior statement is "actually coerced" *(i.e.*, an evaluation of the time between interrogations, and their location and circumstances), in order to see "whether that [initial] coercion has carried over into the second confession." 470 U.S. at 309-310. The Court rejected that contention as well. *Id.* at 310-314.

that "[t]he failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced." *Elstad*, 470 U.S. at 310. The "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion" that is "irrebuttable for purposes of the prosecution's case in chief." *Id.* at 307. But "[w]here an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, the primary criterion of admissibility remains the 'old' due process voluntariness test." *Id.* at 307-308 (internal quotation marks and brackets omitted). The Court in *Elstad* thus cautioned against "appl[ying] our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions."[7] *Id.* at 317-318.

Elstad thus makes clear that the limit of the constitutional rule of *Miranda* is that, outside the public safety context considered in *Quarles*, there is a conclusive presumption in the government's case in chief that an unwarned statement is compelled. But proof of a lack of warnings does not otherwise suffice to invalidate use of unwarned statements. Rather, "the dictates of *Miranda* and the goals of the Fifth

[7] The *Elstad* Court's view of *Miranda* as creating an irrebutable presumption of coercion only in the government's case in chief explained why it rejected application in the *Miranda* context of the Fourth Amendment doctrine of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), that the "fruits" of a constitutional violation must be suppressed. As the *Elstad* Court stated, a court may not "assume[] the existence of a constitutional violation" as the predicate for applying that doctrine. 470 U.S. at 305. See also pp. 29-32, *infra* (explaining the inapplicability of *Wong Sun* in the *Miranda* context), and pp. 38-39 (explaining why *Elstad*'s analysis is consistent with *Dickerson*'s holding that *Miranda* is a constitutional rule).

Amendment proscription against use of compelled testimony are fully satisfied * * * by barring use of the unwarned statements in the case in chief." 470 U.S. at 318.

II. THE *MIRANDA* RULE DOES NOT REQUIRE THE EXCLUSION OF PHYSICAL EVIDENCE DERIVED FROM UNWARNED STATEMENTS

The Court's analysis of *Miranda* explains why it is an exclusionary rule limited to a bar on unwarned statements in the prosecution's case in chief. *Miranda* is a prophylactic rule designed to reduce the risk that an involuntary statement will be admitted against the defendant. The rule casts a wider net than case-specific totality-of-the-circumstances analysis, see *Elstad*, 470 U.S. at 304, because if such case-by-case analysis were the sole source of protection, there would be an unacceptable risk to core Fifth Amendment rights. The *Miranda* rule is limited to excluding unwarned statements from the prosecution's case because the core of the Fifth Amendment prohibits the admission of the defendant's own coerced statements to prove his guilt and because a broader prophylactic suppression rule would impose excessive costs on the truthseeking function of the criminal trial.

By excluding the unwarned statement from the prosecution's case in chief, the core of the Fifth Amendment privilege is protected. The core prohibition corresponds to the sort of inquisitorial practices that brought about the Fifth Amendment: the use of official power to "*extract from the person's own lips* an admission of guilt, *which would thus take the place of other evidence.*" 8 *Wigmore On Evidence* § 2263, at 378 (McNaughton rev. 1961) (emphasis added). *Miranda* provides the defendant with safeguards against the risk

that the Constitution will be violated by the use of his compelled statement, in place of other evidence. Other uses of a defendant's voluntary, but unwarned statement, however, not involving its introduction into evidence, pose a less direct threat to the Fifth Amendment privilege. At the same time, the costs of excluding otherwise voluntary, reliable evidence are high. For that reason, "[t]he exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy." *Chavez*, 123 S. Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part). There is no sufficient justification for excluding physical evidence that the police discover as a result of an unwarned statement.

A. The Costs Of Extending The *Miranda* Rule Outside The Core Fifth Amendment Privilege Are High

The application of *Miranda* to exclude evidence always has costs. The rule "sweeps more broadly than" the basic protection of the Self-Incrimination Clause, because the rule excludes some confessions even in the absence of the actual compulsion that is the target of the Clause. *Elstad*, 470 U.S. at 306. Statements given in custodial interrogation without *Miranda* warnings may be both entirely voluntary and exceptionally reliable. Thus, "[t]he disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Dickerson*, 530 U.S. at 444; see *Withrow* v. *Williams*, 507 U.S. 680, 690 (1993) ("The [*Miranda*] Court indeed acknowledged that, in barring introduction of a statement obtained without the required warnings, *Miranda* might exclude a confession that we would not condemn as 'involuntary in traditional terms,'

* * * and for this reason we have sometimes called the *Miranda* safeguards 'prophylactic' in nature.") (citation omitted). Nonetheless, this Court has determined that, in order to protect Fifth Amendment rights, the cost of excluding some reliable and otherwise admissible evidence is outweighed by the interest in protecting against admission of a compelled confession against a defendant.

In other contexts in the trial, however, this Court's decisions in *Harris*, *Tucker*, and *Elstad* reveal that the costs of exclusion are too great. In *Harris*, for example, the Court explained that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 U.S. at 226. In so holding, the Court emphasized the importance of impeachment as one of the "truth-testing devices of the adversary process." *Id.* at 225. And in *Tucker*, the Court stressed "the strong interest of any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." 417 U.S. at 450.

That interest is strongly implicated when suppression of reliable physical evidence is at issue. Here, for example, the government seeks to introduce at trial the gun whose location respondent provided to police. His unwarned statement would never be used in trial; therefore, he would not face the risk of infringement of his Fifth Amendment right not to have any compelled statements that he might have made admitted in evidence against him. To exclude the gun as well would impose an insuperable barrier to the government's ability to prosecute respondent at all. An effective grant of immunity from prosecution is an excessive cost for society to bear because the police failed to provide

complete warnings to a suspect before asking him questions.

B. There Are No Policy Justifications Sufficient To Justify Exclusion Of Physical Evidence Derived From An Unwarned Statement

In certain Fifth Amendment contexts, a rule excluding derivative evidence has been adopted by this Court. For example, in examining immunity statutes under the Fifth Amendment, this Court has held that the Fifth Amendment privilege of a defendant not to be compelled to be a witness against himself protects against incrimination from evidence that is derived from compelled testimony. *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972); see also *Counselman* v. *Hitchcock*, 142 U.S. 547, 585 (1892). As a textual matter, "the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself." *United States* v. *Hubbell*, 530 U.S. 27, 37 (2000). But "it has * * * long been settled that [the privilege's] protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *Ibid.* The Court has thus determined that, to be coextensive with the protection of the Fifth Amendment, a grant of immunity must preclude not only the use, but also the derivative use of the witness's testimony in a criminal case. *Kastigar*, v. *United States*, *supra* (upholding the constitutionality of 18 U.S.C. 6002, which protects against the use of information "directly or indirectly derived from [compelled] testimony").

This Court has never explicitly held that physical evidence that was derived from compelled or involun-

tary statements made in police interrogation must be excluded from the prosecution's case, nor has it imported into the context of informal compulsion by the police the heavy burden imposed on the prosecution to show that it has not made indirect use of testimony compelled under a grant of immunity. Cf. *Kastigar*, 406 U.S. at 460 (prosecution must carry the burden to establish that its evidence "is derived from a legitimate source wholly independent of the compelled testimony"). But assuming, as the government does not dispute, that some form of a derivative-evidence exclusionary rule would be justified when the police actually overcome the defendant's will through coercive or abusive tactics and produce a compelled statement, cf. *New York* v. *Quarles*, 467 U.S. 649, 672 (1984) (O'Connor, J., concurring in part and dissenting in part), the justifications for such a rule are absent when the record does not establish actual compulsion.

First, the Fifth Amendment is not inherently concerned with physical evidence, and judicially crafted extensions of the Fifth Amendment should be developed with greater restraint when the effect is to exclude evidence that does not have a testimonial component. Second, deterrence concerns are inapt in this context, because the Constitution does not forbid interrogation without prior administration of *Miranda* warnings and, even assuming that deterrence of unwarned questioning were an appropriate purpose of *Miranda*, the rule provides sufficient deterrence by suppressing the unwarned statement itself from use in the government's case. Third, the concerns about unreliable confessions resulting from actual coercion do not carry significant force when the confession itself is not admitted in court and coercion has not been shown;

any unreliability in the confession does not carry over to the physical evidence.

1. *The Fifth Amendment Is Not Inherently Concerned With Physical Evidence*

In assessing whether courts should suppress physical evidence derived from a failure to give *Miranda* warnings, it is appropriate to recall that the Fifth Amendment itself is not directly concerned with compulsory provision of physical evidence. The Self-Incrimination Clause is concerned directly with *testimony*; it does not protect individuals from being required to provide nontestimonial evidentiary materials, even if they may be incriminating. *United States* v. *Hubbell*, 530 U.S. 27, 34-35 (2000). That principle was articulated in *Schmerber* v. *California*, 384 U.S. 757 (1966), which was handed down only a week after *Miranda*. In *Schmerber*, the Court held that the withdrawal of blood from a defendant and the admission of its analysis at his trial did not violate the Self-Incrimination Clause of the Fifth Amendment. The Court held that "the privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature," and "the withdrawal of blood and use of the analysis in question * * * did not involve compulsion to those ends." *Id.* at 761. The Court explained that "[s]ince the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." *Id.* at 765.

Schmerber thus makes clear that the Self-Incrimination Clause of the Fifth Amendment does not bar the admission of nontestimonial evidence compelled

from a suspect. An individual may be required, consistently with the Self-Incrimination Clause, to provide a blood sample, as in *Schmerber*, a voice exemplar, see *United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973), or a handwriting sample, see *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967), and an individual may be required as well to participate in a lineup, see *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967), or to try on a blouse in court, see *Holt* v. *United States*, 218 U.S. 245, 252-253 (1910).

This case raises a distinct issue from the *Schmerber* line of cases because here, when a suspect answers police questions about the location of evidence without *Miranda* warnings, he has unquestionably made testimonial communications that lead the officers to incriminating facts. But if *Schmerber* lies at one polar Fifth Amendment extreme (the permitted use of compulsion to obtain nontestimonial evidence) and a coerced confession lies at the other (the prohibited use of compulsion to obtain testimonial evidence), then this case falls in the middle. As Judge Friendly observed more than three decades ago, the use of a suspect's uncoerced, but unwarned, statements, to locate physical incriminating evidence "differs only by a shade from the permitted use for that purpose of his body or his blood." Henry J. Friendly, *Benchmarks* 280 (1967). He continued:

> Since the case lies between what the state clearly may compel and what it clearly may not, a strong analytical argument can be made for an intermediate rule whereby although it cannot require the suspect to speak by punishment or force, the non-testimonial fruits of speech that is excludable only for failure to comply with the *Miranda* code could still be used.

Ibid. That "intermediate" rule appropriately reconciles Fifth Amendment values by excluding the unwarned statement, but—when the statement is otherwise not compelled—allowing admission of its tangible and nontestimonial "fruits."

2. A Deterrence Rationale Does Not Support Extending Miranda To Exclude Derivative Evidence

In several of this Court's opinions, the Court has considered whether the need to deter improper conduct justified the extension of *Miranda*'s rule barring unwarned statements from the government's case in chief. See *Elstad*, 470 U.S. at 308; *Tucker*, 417 U.S. at 447; *Hass*, 420 U.S. at 723; *Harris*, 401 U.S. at 225; see also *Nix* v. *Williams*, 467 U.S. 431, 442-443 (1984). Although in each of those cases, the Court rejected the extension of the *Miranda* exclusionary rule on the basis of a deterrence rationale, the court of appeals in this case placed its primary reliance on a deterrence rationale to embrace an expansive fruits rule that reaches physical evidence derived from unwarned statements. Pet. App. 26a-33a. Deterrence offers no justification for suppression of the physical evidence obtained in this case.

a. *Deterrence policies are inapplicable to* Miranda. In *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963), the Court determined that evidence that is the fruit of an illegal search or seizure under the Fourth Amendment must be suppressed. In *Elstad*, the Court declined to apply the Fourth Amendment "fruits" doctrine to exclude evidence that could be viewed as the "fruit" of a *Miranda* violation. See 470 U.S. at 305-309. The Court emphasized that there is a crucial distinction

between an actual coerced confession and a statement in which "the breach of the *Miranda* procedures * * * involved no actual compulsion." *Id.* at 308. In the latter case, the underlying Fifth Amendment rule prohibiting introduction of "compelled" testimony is not violated. *Id.* at 306-307 & n.1.

The court of appeals believed that *Elstad* "drew a distinction between fruits consisting of a subsequent confession by the defendant after having been fully *Mirandized*," which need not be suppressed, and "fruits consisting of subsequently obtained 'inanimate evidentiary objects,'" which the court of appeals concluded must be suppressed. Pet. App. 16a (quoting *Elstad*, 470 U.S. at 309). *Elstad* did involve a subsequent statement by the defendant, not physical evidence, and the Court thus focused on the defendant's request for derivative suppression of his voluntary, warned statement after he had made an unwarned (but also voluntary) statement. But *Elstad*'s rationale is not limited to that specific type of a "fruits" claim. In addition to noting that the second statement in that case was the product of the suspect's "own volition," 470 U.S. at 308; *Elstad* more broadly rejected the proposition that the *Wong Sun* doctrine applies to the fruits of a statement obtained without *Miranda* warnings. After discussing *Tucker* and that decision's refusal to apply suppression, the *Elstad* Court stated that *Tucker*'s reasoning applies "with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation" was "a witness" "*an article of evidence*," or "the accused's own voluntary testimony." 470 U.S. at 308 (emphasis added). *Elstad* made clear that suppression was unwarranted in all three contexts. It is therefore unsurprising that this Court in *Dickerson* read *Elstad* as broadly "refusing to apply the traditional 'fruits' doctrine developed in Fourth

Amendment cases" in view of the *Elstad*'s Court's recognition that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." 530 U.S. at 441.

An unreasonable search violates the Fourth Amendment when the search occurs, and "use of fruits of a past unlawful search or seizure work[s] no new Fourth Amendment wrong." *United States* v. *Leon*, 468 U.S. 897, 906 (1984) (internal quotation marks omitted). The Fourth Amendment's exclusionary rule, including the *Wong Sun* "fruits" doctrine, is designed to deter such violations, even at the cost of losing reliable evidence at trial. See *United States* v. *Calandra*, 414 U.S. 338, 348 (1974) (Fourth Amendment exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect" and is not "a personal constitutional right of the party aggrieved"); accord *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Janis*, 428 U.S. 433, 446 (1976).

But this Court has recognized the different purposes of the Fourth Amendment exclusionary rule and *Miranda*. *Withrow* v. *Williams*, 507 U.S. 680, 691 (1993) (noting that "*Miranda* differs from *Mapp* in both respects" that define the Fourth Amendment exclusionary rule). Police officers do not violate the Fifth Amendment as implemented by *Miranda* when they take an unwarned statement during custodial interrogation.[8] *Miranda*'s implementation of the Fifth

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[8] Indeed, as the plurality in *Chavez* v. *Martinez*, 123 S. Ct. at 2001, indicated, "it is not until the[] use [of statements compelled by police interrogation] in a criminal case that a violation of the Self-Incrimination Clause occurs" (citation omitted). It follows from that principle that no violation of the Self-Incrimination Clause occurs merely when the police conduct unwarned questioning (and, therefore, that *Wong Sun*'s principles do not

Amendment requires only that the defendant be accorded the right at trial to exclude the unwarned statement from the government's case. See *Chavez*, 123 S. Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part) ("*Miranda* mandates a rule of exclusion. * * * The exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy.").

Miranda itself does contain language that purports to establish rules for the conduct of the police. *E.g.*, 384 U.S. at 473-474. Some of this Court's later cases contain similar descriptions of the *Miranda* procedures, see, *e.g.*, *Moran* v. *Burbine*, 475 U.S. 412, 420 (1986) ("*Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused."), and speak of assessing whether particular applications of the *Miranda* exclusionary rule would deter departures from those procedures, see, *e.g.*, *Michigan* v. *Tucker*, 417 U.S. at 448. But this Court's understanding of *Miranda* has evolved, and the rule's purpose, as properly understood, is to guard against the risk that *the courts* will erroneously admit a coerced confession; it is not to regulate out-of-court conduct by *the police*. See *Dickerson*, 530 U.S. at 442, 443-444; see also *Chavez*, *supra*. Accordingly, the taking of unwarned statements need not be deterred.

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directly apply in the Fifth Amendment context). But that principle does not resolve whether, if police questioning produced an actually compelled statement, the courts could exclude evidence derived from the statement. The government does not dispute that they could. In the present context, the basis for not extending *Miranda* to suppress derivative physical evidence is that (1) such a rule would extend *Miranda* beyond its prophylactic purposes, and (2) the costs of suppression are too high and unjustified, for the reasons described in the text.

b. *If deterrence were a purpose of* Miranda, *exclusion of the unwarned statements from the government's case in chief would be sufficient.* The government's primary argument is that deterrence is not a purpose of the *Miranda* exclusionary rule, and that the police do not engage in misconduct by questioning without providing the warnings.[9] But even if deterrence of the failure of police to give *Miranda* warnings were the basis of the *Miranda* exclusionary rule, the rule should not be extended to exclude derivative evidence. Suppression of the unwarned statement itself in the government's case in chief is a sufficient deterrent. *Harris*, 401 U.S. at 225 ("Assuming that the [*Miranda*] exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."); cf. *New York* v. *Quarles*, 467 U.S. 649, 669 (1984) (O'Connor, J., concurring in part and dissenting in part.) ("The harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations, and the suppression of such incriminations should by itself produce the optimal enforcement of the *Miranda* rule.").

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[9] There are many settings in which the police might appropriately desire to interrogate without warnings, if they conclude that the giving of the warnings might jeopardize their ability to obtain answers. This is true not only under the public safety exception to *Miranda* adopted in *Quarles*, but in other situations that may fall outside of *Quarles*. "The most obvious example, first suggested by Judge Henry Friendly, involves interrogation directed to the discovery and termination of an ongoing criminal activity such as kidnapping or extortion." *Quarles*, 467 U.S. at 668 n.3 (O'Connor, J., concurring in part and dissenting in part.).

This case illustrates why any greater deterrence would be inappropriate. The officer in this case began to give respondent the *Miranda* warnings, only to be interrupted (after advising respondent of the right to remain silent) by respondent's assertion that he knew his rights. It is difficult to characterize the officer's decision not to insist on completing the warnings as such culpable conduct as to warrant suppressing not only the unwarned statements themselves, but also the gun that was found as a result.[10] The same will be true in many instances in which a fast moving investigation, or confusion about whether a defendant has already received *Miranda* warnings, results in a failure to issue them. Where, as in such cases, the failure to administer *Miranda* warnings was not a purposeful interrogation tactic to obtain incriminating evidence, a deterrence rationale is particularly weak.

The court of appeals believed that "the inability to offer [respondent's] statements in this case affords no deterrence, because the ability to offer the physical evidence (the gun) renders the statements superfluous to conviction." Pet. App. 27a. The court, however, was mistaken. Physical evidence derived from unwarned statements must still be independently linked to an accused to have any probative force at trial. Because that link may be difficult to make without the defendant's statement, the suppression of an unwarned statement could preclude prosecution in many cases despite the admissibility of the derivative physical

[10] Notably, respondent consented to allow the officer to enter his house to retrieve the gun. A valid consent to search under the Fourth Amendment does not require any notification of the person's right to refuse; it need only be voluntary. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

evidence. For example, suppression of an accused's unwarned statement acknowledging his ownership or the location of a firearm or drugs often precludes prosecution in the not uncommon situation where the firearm or drugs are found in a location (such as a residence or a car) to which others also have ready access. Similarly, the suppression of an accused's unwarned confession to a murder that led to the location of the victim's body could easily preclude a prosecution for murder despite the admissibility of the victim's body. The police have significant incentives to preserve the ability to admit a defendant's statement in court and, therefore, to issue *Miranda* warnings. The court of appeals significantly underestimated the deterrent effect of suppressing an accused's unwarned statement.

3. *The Exclusion Of Physical Evidence Does Not Serve The Fifth Amendment's Concern With The Reliability Of Evidence*

Excluding physical evidence that results from unwarned statements would also have no purpose connected to the Fifth Amendment's concern with reliability. The privilege against compelled self-incrimination is based in part on the recognition that "coerced confessions are inherently untrustworthy." *Dickerson*, 530 U.S. at 433. Although coerced confessions are excluded whether or not they are determined to be true, see *Rogers* v. *Richmond*, 365 U.S. 534, 540-541 (1961), "it also seems clear that coerced statements have been regarded with some mistrust" and there is a concern that "severe pressures" caused by particular interrogation practices "may override a particular suspect's insistence on innocence" and lead him "to accuse himself falsely." *Tucker*, 417 U.S. at 444-449 & n.23. By excluding an entire class of statements in which "the

coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," *Dickerson*, 530 U.S. at 435, the *Miranda* rule thus "guard[s] against 'the use of unreliable statements at trial.'" *Withrow* v. *Williams*, 507 U.S. 680, 692 (1993) (quoting *Johnson* v. *New Jersey* 384 U.S. 719, at 730 (1966)); see also *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 240 (1973) ("The [*Miranda*] Court made it clear that the basis for the decision was the need to protect the fairness of the trial itself.").

Where physical evidence is at issue, however, that reliability concern has no force. As a general rule, physical evidence, such as the gun seized in this case, undoubtedly constitutes "reliable," *Stone*, 428 U.S. at 490, and "trustworthy" evidence, *Leon*, 468 U.S. at 907. See *Tucker*, 417 U.S. at 458 (Brennan, J., concurring) ("[T]he element of unreliability * * * is of less importance when the admissibility of 'fruits' is at issue. There is no reason to believe that the coercive atmosphere of the station house will have any effect whatsoever on the trustworthiness of 'fruits.'"). As Judge Friendly explained:

> There is thus good reason to impose a higher standard on the police before allowing them to use a confession of murder than a weapon bearing the confessor's fingerprints to which his confession has led; doubtless this is the reason why fruits of a confession "not blatantly coerced" are admitted in England, India, and Ceylon, countries on whose experience the *Miranda* opinion relied.

Benchmarks 282; see also *Quarles*, 467 U.S. at 673 (O'Connor, J., concurring in part and dissenting in part.).[11] Consequently, admitting such physical evidence at trial does not implicate the Fifth Amendment's concern to protect the truth-seeking process, while suppression of that physical evidence would plainly undermine the search for the truth.

III. *DICKERSON* DOES NOT ALTER THE SCOPE OF THE *MIRANDA* RULE

In *Dickerson* v. *United States*, 530 U.S. 428 (2000), the Court held that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively," and, "[f]ollowing the rule of *stare decisis*, [the Court] decline[d] to overrule *Miranda* [itself]." 530 U.S. at 444. Nothing in the Court's recognition that *Miranda* "is constitutionally based," *id.* at 440, however, requires any broadening of the scope of the *Miranda* rule. To the contrary, the Court's decision in *Dickerson* itself rested on principles of stare decisis. Far from suggesting an alteration in the scope of the *Miranda* exclusionary rule to encompass evidence derived from unwarned statements, *Dickerson* is inconsistent with any such alteration.[12]

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[11] The English rule is now embodied in a statute. See Police and Criminal Evidence Act, 1984, § 76(4) ("The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence * * * of any facts discovered as a result of the confession."); see P.J. Richardson et al., *Archbold—Criminal Pleading, Evidence and Practice*, § 15-274, at 1447 (2003) ("Under the law prior to the [above] Act * * *, evidence of facts discovered as a result of an inadmissible confession could be given but without calling in aid any part of the confession from which they may have been derived: *R.* v. *Warwickshall* (1783) 1 Leach 298; *R.* v. *Berriman*, (1854) 6 Cox 388. * * * Section 76(4) retains the law as established in *Warwickshall* and *Berriman*.").

[12] Before this Court decided *Dickerson*, the majority of the courts of appeals, including the court below, refused to suppress

1. The court of appeals believed that "*Dickerson* undermined the logic underlying *Tucker* and *Elstad*." Pet. App. 13a. In reaching its conclusion that the *Miranda* rule was a "constitutional decision," 530 U.S. at 432, however, the Court in *Dickerson* referred specifically and approvingly to *Elstad*'s rejection of the *Wong Sun* fruits doctrine:

> Our decision in [*Elstad*]—refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.

Id. at 441 (emphasis added). *Dickerson*, therefore, did not alter the settled rule announced in *Elstad* that limited the scope of the Miranda exclusionary rule. Indeed, the doctrine of stare decisis was integral to the holding in *Dickerson*. *Id.* at 444 ("Following the rule of

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physical evidence derived from an unwarned statement. See *United States* v. *Morales*, 788 F.2d 883, 886-887 (2d Cir. 1986); *United States* v. *Elie*, 111 F.3d 1135, 1141 (4th Cir. 1997); *United States* v. *Bengivenga*, 845 F.2d 593, 600-601 (5th Cir.) (en banc), cert. denied, 488 U.S. 924 (1988); *United States* v. *Sangineto-Miranda*, 859 F.2d 1501, 1514-1519 (6th Cir. 1988); *United States* v. *Cannon*, 529 F.2d 890, 894-895 (7th Cir. 1976); *United States* v. *Gonzalez-Sandoval*, 894 F.2d 1043, 1048 (9th Cir. 1990); *United States* v. *McCurdy*, 40 F.3d 1111, 1117 (10th Cir. 1994). The only post-*Dickerson* court of appeals to change its position after *Dickerson* was the Tenth Circuit in this case. See Pet. 10-12 (citing cases). The First Circuit has adhered to its position declining to announce a flat rule against suppression of the fruits of an unwarned statement, but holding that suppression of physical fruits is not warranted for a negligent failure to give *Miranda* warnings. *United States* v. *Faulkingham*, 295 F.3d 85 (1st Cir. 2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002).

stare decisis, we decline to overrule *Miranda*."). And in its stare decisis analysis, the Court in *Dickerson* also placed critical reliance on the continuing validity of its post-*Miranda* cases (which include *Tucker* and *Elstad*) explaining that those cases had "reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.* at 443-444.

Dickerson thus preserved the distinction in this Court's cases between the rules limiting the admissibility of unwarned statements in the government's case in chief and the rules permitting the admissibility of fruits of an unwarned voluntary statement. Aside from cases involving an exception, see *New York* v. *Quarles*, 467 U.S. 649 (1984), unwarned statements are inadmissible as evidence in the government's case in chief. Under the principles of *Tucker* and *Elstad*, however, evidence derived from those statements is admissible, so long as the unwarned statements were voluntary under the traditional totality-of-the-circumstances test.

2. The court of appeals believed the reasoning of *Elstad* and *Tucker* was called into doubt because those cases had reasoned that departures from *Miranda*'s warning requirements breached only a non-constitutional rule, while *Dickerson* "declared that *Miranda* articulated a constitutional rule rather than merely a prophylactic one." Pet. App. 12a. There is language in *Elstad* and *Tucker* that refers to a breach of *Miranda* procedures as distinct from a violation of the Constitution.[13] But that language is best understood as

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[13] *Tucker* stated that questioning without warnings "did not abridge [the defendant's] constitutional privilege * * * but departed only from the prophylactic standards later laid down by this

drawing a distinction between actual coercion and the presumption of coercion that *Miranda* adopts for a specific and limited purpose. The dichotomy that the court of appeals drew between *Miranda* as a "constitutional" rule and *Miranda* as a "prophylactic" rule in fact does not exist. *Miranda* is a prophylactic constitutional rule designed to provide additional protection for the core right defined in the Self-Incrimination Clause that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." It is prophylactic, in that it excludes some statements that, in a perfect world, might not be deemed compelled. But it is constitutional, in that it seeks to protect against the possibility of admitting, because of the uncertainties of the judicial process, an actually compelled statement.

Dickerson therefore provides no reason for concluding that a failure to give *Miranda* warnings necessitates a broad application of the fruit-of-the-poisonous-tree doctrine. The *Miranda* rule serves its purpose of protecting the core right of a defendant not be a witness against himself at his criminal trial by excluding unwarned statements from the prosecution's case in chief. Extension of its automatic rule of exclusion to evidence derived from unwarned statements is not required by the Constitution and would impose serious costs on the truthseeking function of a criminal trial.

Court in *Miranda* to safeguard that privilege." 417 U.S. at 446. *Elstad* stated (in describing *Tucker*) that "[s]ince there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed." 470 U.S. at 308.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

CHRISTOPHER A. WRAY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

JOSEPH C. WYDERKO
Attorney

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